1978

State of Utah v. Johnny Frank Sosa : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT

OF THE STATE OF UTAH

STATE OF UTAH,)

Plaintiff-Respondent,)

vs.) No.

JOHNNY FRANK SOSA,)

Defendant-Appellant.)

BRIEF OF APPELLANT

Appeal from the Second Judicial

Davis County, State of Utah, the Hono

Presiding.

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TABLE OF CONTENTS

CASES CITED

STATUTES CITED

TABLE OF CONTENTS CONT'D

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH	)	
Plaintiff/Respondent	)	
vs.		
JOHNNY FRANK SOSA	)	Case No. 15929
Defendant/Appellant	)	

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with Possession of a Dangerous Weapon by a Convicted Person, in violation of Utah Code Annotated, Section 76-10-503 (Supplement, 1973), as a result of being seen on June 4, 1977, in Ogden, Utah in possession of a .22 caliber rifle.

DISPOSITION IN LOWER COURT

Appellant was tried before the Honorable Judge Duffy Palmer sitting without a jury and was found guilty of Possession of a Dangerous Weapon by a Convicted Person, a 3rd degree felony, on September 22, 1977. On June 15, 1978, Judge Palmer sentenced the appellant to a term of 0-5 years to be served at the Utah State Prison.

RELIEF SOUGHT ON APPEAL

Appellant seeks an order of this court reversing the verdict of the trial Judge and relieving him of the trial court's judgement.

STATEMENT OF FACTS

The State's evidence indidcates that on the 4th day of June, 1977 on 25th street in Ogden Utah, appellant drove a van up in front of

A group of people and fired towards them with a rifle. After the shots were fired, the van was driven away.

Shortly thereafter, three police officers from the Ogden City Police Department stopped a van matching the description of the truck driven by appellant several blocks from the location of the shooting incident. The police identified appellant as the man who exited from the driver's side when the van came to a stop. A .22 rifle with a live round in the firing chamber, was found under the front right seat. An unloaded .22 rifle was also found in the van.

On the 6th of June 1977, the Weber County Attorney's office issued a complaint against appelant for Carrying a Loaded Firearm in a Vehicle and Possession of Marijuana. On July 5, 1977, he was found guilty of both charges in Ogden City Court. On June 7th, 1977, the County Attorney issued a complaint charging appellant with Possession of a Dangerous Weapon by a Convicted Person. Appellant was tried and convicted of this charge on September 22, 1977. Appellant was subsequently sentenced to serve 0-5 years at the Utah State Prison. This appeal is from that conviction.

ARGUMENT

POINT 1

THE TRIAL JUDGE ERRED IN NOT RULING THAT THE PROSECUTION OF THE APPELLANT IN THIS CASE, WAS BARRED BY THE SINGLE CRIMINAL EPISODE PROVISIONS OF THE UTAH CODE.

Utah Code Ann. § 76-1-403 states:

> If a defendant has been prosecuted for one or more offenses arising out of a single criminal episode, a subsequent prosecution for the same or a different offense is barred if:
>
> (a) The subsequent prosecution is for an offense that was or should have been tried under § 76-1-402 (2) in the former prosecution; and
>
> (b) The former prosecution:
>
> (i) ...
>
> (ii) Resulted in conviction; or
>
> (iii) ...

For prosecution to be barred under the provisions of the above statute, three conditions msut be met. First, the charge of Possession of a Dangerous Weapon by a Convicted Person, Utah Code Annotated, Section 76-10-505, 1953, must be found to be the same criminal episode as the prior conviction for Carrying a Loaded Firearm in a Vehicle, 76-10-505 , 1953. Second, the conviction in this case must be found to be "for an offense that was or should have been tried under Section 76-1-402 (2) in the former prosecution" of the firearm in a vehicle charge. Third, the former prosecution must have resulted in a conviction. (On this point there can be no conflict. Appellant was convicted of Carrying a Loaded Firearm in a Vehicle on July 6, 1977.)

A Single Criminal Episode is definded in Utah Code Annotated, Section 76-1-401 as:

> "... all conduct which is closely related in time and is incident to an attempt or an accomplishment of a single criminal objective"

In order to be convicted of "Possession of a Dangerous Weapon by a Convicted Person", it must be established, among other things, that the defendant had "in his possession or under his custody or control, any dangerous weapon..", Utah Code Annotated,Section 76-10-503,(1953). In order to be convicted of "Carrying a Loaded Firearm in a Vehicle" , a defendant must be shown to have actually carried a loaded firearm in a vehicle with knowledge that the firearm is in the automobile and that it is loaded. A Person carrying a loaded firearm in a vehicle would, of course, have in his possession or under his custody or control a dangerous weapon. The two offenses that are the subject matter of this case, occurred at exactly the same time and were both aimed towards the objective of possessing a firearm.

Therefore, the two offenses are clearly a Single Criminal Episode. Utah Code Ann., § 76-1-402 (2) states:

> Whenever conduct may establish separate offenses under a single criminal episode, unless the court otherwise orders to promote justice, a defendant shall not be subject to separate trials for multiple offenses when:
>
> (a) The offenses are within the jurisdiction of a single court, and
>
> (b) The offenses are known to the prosecuting attorney at the time the defendant is arraigned on the first information or indictment.

In the present case it is obvious that the prosecution was aware of both offenses since complaints were issued on the charges within one day of each other. The more difficult question is whether the cases were within the jurisdiction of a single court. The loaded Firearm in a Vehicle charge, (a class "B" misdemeanor) was tried in the Ogden City Court while the Possession of a Dangerous Weapon charge, (a third degree felony) was tried in the Weber County District Court. The question to be answered, by this court, is whether the cases are within the jurisdiction of one court and could have been tried together.

In the recent case of State v. Cooley, 575 P.2d 693 (Utah 1978) this court, in a similar factual situation, held that the district court did not have the power to invoke original jurisdiction of a class "B" misdemeanor case, and that therefore the district court could not hear both the class "A" and the class "B" misdemeanor cases.

Appellant is hereby requesting that this court reconsider its decision in the Cooley case.

In the case of State v. Johnson 100 Utah 316, 114 P. 2d 1034 (1941), the court reviewed the language of Article VIII, § 7 of the Utah Constitution which provides that:

> The district court shall have original jurisdiction in all matters civil and criminal, not expected in this constitution, and not prohibited by law;

The court compared this provision with the Utah State law providing that Class "B" misdemeanors must be initiated in the justice's and city courts. After a rather extensive discussion, the court concluded that the district court does have original jurisdiction of a class "B" misdemeanor but that the proceedure and venue require that the case be initiated in the city court. Id at 1042.

If, as this court ruled in Johnson's, the district court has jurisdiction of a class "B" misdemeanor, then both of the offenses in question in this case fall within the jurisdiction of a single court and therefore the provisions of Utah Code Ann. § 76-1-402 (2) have been met. Thus all requirements set forth in Utah Code Ann. § 76-1-403 (1) have been met and the trial court erred in not granting the defense motion to bar the prosecution of the felony charge.

POINT II

THE TRIAL COURT ERRED IN RULING THAT APPELLANT'S TRIAL IN THIS CASE WAS NOT A VIOLATION OF THE TWICE IN JEOPARDY PROVISIONS OF THE UTAH AND UNITED STATES CONSTITUTION.

The Utah and the United States Constitution both provide, in substanially the same language, that no person shall be twice put in jeopardy for the same offense. i.e. Utah Constitution Article 1 § 12 and the Fifth amendment of the United States Constitution. In Utah the constitutional provisions are also set forth by statute. i.e. Utah Code Ann. § 77-1-10. A large body of Federal case law exists interpreting the provisions of the Fifth amendment guarantee against double jeopardy and this law was made applicable to state prosecutions through the fourteenth amendment in the case of Benton v Maryland, 395 US 784,

89, S Ct. 2056, 23 L.Ed. 2d 797 (1969).

The U.S. Supreme Court has consistantly ruled that for double jeopardy to apply, the second case need not be exactly the same charge as the prior case upon which the defendant has been convicted or acquitted. In Waller v. Florida, 397 US 387, 90 S. Ct. 1184, 25 L.Ed. 2 435 (US 1970) the court considered a situation where the defendant had removed a canvas mural from the City Hall of St.Petersbury, Florida. After being convicted in Municipal Court of disorderly breach of the peace and destruction of city property, he was tried for grand larceny in the Circuit Court of Florida and again convicted. Upon review, the Supreme Court in a unanimous decision, ruled that since the state felon charge was based on the same acts as the earlier Municipal Court conviction for the lesser included offenses, the second trial constituted double jeopardy in violation of the Fifth and Fourteenth amendment. Id at 394 & 395.

In the more recent case of Brown v. Ohio, 432 US 161, 97 S Ct. 22 53 L. Ed. 2d 187 (1977), the court considered a situation where the defendant had, without authority, taken a car from a parking lot in Cleveland, Ohio, and was apprehended in the car nine days later. The defendant plead guilty and was sentenced on a Joy Riding charge as a result of the incident. Upon the defendant's release from jail he was charged and prosecuted for Car Theft, based upon the same incident which created the Joy Riding charge. The court ruled that since the offense of Joy Riding is a lesser included offense of the offense of car theft, that the offenses constitute the same offense for double jeopardy purposes. This is true even though the Joy Riding charge was for the last day of the nine day Joy Ride, whereas the Car Theft charge originated the day the car was taken. Id at 168 & 169.

In the present case, as discussed previously, the appellant was first charged with "Carrying a Loaded Firearm in a Vehicle " and was tried and convicted of that charge. He was later charged with "Possession of a Dangerous Weapon by a Convicted Person." Upon a plea of "once in jeopardy" the appellant was tried and convicted of the felony charge. While in many cases, "Carrying a Loaded Firearm in a Vehicle" would not be a lesser included offense of "Possession of a Dangerous Weapon by a Convicted Person" in this case it clearly was. The uncontested facts indicate that during the entire incident, from the time appellant fired the gun on 25th street until he was apprehended several blocks away, he was in a motor vehicle in possession of a loaded firearm. Therefore, the only element that differs between the two offenses is the requirement that the defendant must be a convicted person in order to be found guilty of the felony. The reason for the double jeopardy provision in the United States and the Utah Constitution is to prevent situations like the one here in question where a person is tried twice for offenses that are substanially the same and that arise out of exactly the same set of circumstances.

CONCLUSION

The single criminal episode provision of the Utah Code and the guarantee by the Utah and the US Constitution against double jeopardy were ment to insure that a defendant is not punished twice for one criminal act.

In the present case the appellant has already paid his debt to society for his wrongful act of June 4, 1977. For this reason appellant respectfully requests this court to review the decision of the trial court and rule that he was wrongly convicted and sentenced on the felony

charge of "Possession of a Dangerous Weapon by a Convicted Person."

Respectfully submitted

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Attorney for Appellant